IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAACO ENTERPRISES, INC.,	:	
Plaintiff	:	
	:	
v.	:	02-CV-853
	:	
DALLAS W. BECKSTEAD,	:	
SHARLEEN BECKSTEAD,	:	
& POWERPAINTER, LLC	:	
Defendants	:	

Memorandum & Order

Anita B. Brody, J. December , 2002

Plaintiff, Maaco Enterprises, Inc. ("Maaco"), commenced this action against defendants Dallas Beckstead, Sharleen Beckstead, and their limited liability company PowerPainter, LLC ("PowerPainter"), seeking monetary damages, lost future royalties, and accounting and declaratory relief. Before me is plaintiff's motion pursuant to Fed. R. Civ. P. 55(b) for default judgment against defendant PowerPainter, and defendant PowerPainter's motion pursuant to Fed. R. Civ. P. 55(c) to set aside the Clerk of Court's previous entry of default in this case. For reasons set forth below, I grant defendant's motion to set aside the previously entered default.[1]

[1]Because I am granting defendant's motion to set aside the default, plaintiff's motion for default judgment is moot.

I. Background[2]

On March 4, 2002, plaintiff effected service of its complaint on defendant PowerPainter by means of personal service upon Sharleen Beckstead, as a member of PowerPainter.[3] At the time, Sharleen and Dallas Beckstead were separated and in the process of obtaining a divorce. Since the time of their separation, Dallas Beckstead had assumed responsibility for PowerPainter. On March 22, 2002, Grant Sumsion, counsel for Dallas Beckstead and PowerPainter, contacted counsel for Maaco and represented that he would accept service on behalf of Dallas Beckstead and PowerPainter. Maaco agreed to send the appropriate form to Mr. Sumsion.

On March 28, 2002, counsel for Maaco wrote to Mr. Sumsion and enclosed an Acceptance of Service form for Mr. Sumsion's signature. PowerPainter alleges that Mr. Sumsion expected to receive a Waiver of Service form. PowerPainter further alleges that Mr. Sumsion, unfamiliar with the Acceptance of Service form, believed the form should be signed by an attorney admitted to practice in the Eastern District of Pennsylvania. As such, PowerPainter and Dallas Beckstead attempted to retain local counsel. PowerPainter alleges it informed Maaco's counsel that it was attempting to retain local counsel to execute the Acceptance of Service form. PowerPainter alleges that Dallas Beckstead had to borrow money to pay local counsel, which resulted in a further delay in PowerPainter's ability to obtain local counsel and accept service. PowerPainter alleges that

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[2]The factual background in this case is gleaned from plaintiff's and defendant's motions and responses. In applying Rule 55(c) and deciding whether to set aside an entry of default, the district court applies a "standard of liberality and resolv[es] all doubts in favor of the defaulting party." Metlife Capital Credit Corp.,1992 WL 3467772, at *2; In re Arthur Treacher's Franchise Litig., 92 F.R.D. 398, 415 (E.D.. Pa. 1981).

[3]Sharleen Beckstead was also served in her individual capacity. The court granted Sharleen Beckstead an extension of time in which to file her answer to Maaco's complaint.

throughout this time, both Dallas Beckstead and his attorney, Mr. Sumsion, were under the [false] impression that because process was officially served only on Sharleen Beckstead, there was no service on PowerPainter and therefore no answer was due from PowerPainter..

On May 7, 2002, Maaco filed both a Request for Default against PowerPainter and a Motion for Entry of a Default Judgment. Maaco also requested from the court an alias summons to serve Dallas Beckstead as a representative of PowerPainter. Shortly thereafter, Dallas Beckstead and PowerPainter retained local counsel, Mathieu Shapiro, who immediately contacted Maaco's counsel and, while allegedly attempting to reach a resolution of this matter, requested an extension of time to answer the Motion for Entry of a Default Judgment. Mr. Shapiro's request was granted. On June 5, 2002, Mr. Shapiro returned an Acceptance of Service form on behalf of defendant Dallas Beckstead.[4] When the parties were unable to reach a resolution, PowerPainter filed its response to Maaco's Motion for Entry of a Default Judgment and this Cross-Motion to Set Aside the Default. Finally, on August 21, 2002, I held a conference regarding plaintiff's request for default judgment and defendant's motion to set aside the default..

II. Discussion

Defendant PowerPainter moves this court to set aside the default entered against it on Monday 7, 2002, and thereby preclude an entry of Default Judgment against it pursuant to Fed. R. Civ. P. 55(c). Fed. R. Civ. P. 55(c) provides that "for good cause shown the court may set aside an entry of default" by the Clerk of Court. Fed. R. Civ. P. 55(c). In applying Rule 55(c) and deciding

[4]Mr.Shapiro did not, however, return an Acceptance of Service form on behalf of defendant PowerPainter.

whether to set aside an entry of default, the district court exercises its discretion, "applying a standard of liberality and resolving all doubts in favor of the defaulting party." Metlife Capital Credit Corp.,1992 WL 346772, at *2; In re Arthur Treacher's Franchise Litig., 92 F.R.D. 398, 415 (E.D.. Pa. 1981).

The following factors are considered when deciding whether to set aside an entry of default: (i) whether the plaintiff will be prejudiced if the default is lifted; (ii) whether the defendant has a meritorious defense; and (iii) whether the default was a product of the defendant's culpable or inexcusable conduct. See, Duncan v. Speach, 162 F.R.D. 43, 44 (E.D.Pa. 1995)(motion for default judgment and motion to set aside entry of default); Metlife Capital Credit Corp. v. Austin Truck Rental of Allentown, Inc., 1992 WL 346772 (E.D. Pa. 1992)(motion to set aside entry of default); Accuweather, Inc. v. Reuters Ltd., 779 F. Supp. 801, 802 (M.D. Pa. 1991) (motion to set aside entry of default).

Applying these principles here, I exercise my discretion to set aside the default previously entered against the defendant in this case. Regarding the first principle, prejudice to the plaintiff exists if the claim is now "impaired in some material way or if relevant evidence has become lost or unavailable." Accuweather, 779 F. Supp. at 802. Aside from the need to defend on the merits, plaintiff can demonstrate no prejudice resulting from defendant's default, and indeed has not even attempted to do so. Allowing the defendant to put plaintiff to its proof does not in itself materially impair or otherwise compromise plaintiff's claim so as to constitute the sort of prejudice contemplated by the default judgment rule. See Metlife Capital Credit Corp., 1992 WL 346772, at *3 ("prejudice" for purposes of Fed. R. Civ. P. 55 requires showing that claim would be materially impaired because of loss of evidence or other substantial factor). Accordingly, the prejudice factor

militates in favor of setting aside the previous default.

Also undermining plaintiff's position is the second factor in the analysis, which asks whether the defendant has available a meritorious defense. The requisite standard does not require the defendant "to prove beyond a shadow of a doubt that it will win at trial, but merely to show that it has a defense to the action which as least has merit on its face." Emasco Ins. Co. v. Sambrick, 834 F. 2d 71, 74 (3d Cir. 1987). Defendant cites several facially valid defenses here. These include: (1) Maaco's alleged inducement of defendants to enter into the contract; (2) Maaco's alleged failure to supply the support and training it was contractually obligated to supply; and (3) Maaco's alleged wrongful closure and tortious interference with the franchise. Because such defenses possess at least the appearance of validity, they are sufficient to meet the "meritorious defense" requirement.

Finally, regarding the third factor of culpable conduct on the part of the defendant, a motion to set aside a default should not be granted if the defendant "exhibited bad faith or if such conduct was part of a deliberate trial strategy." Metlife Capital Credit Corp., 1992 WL 346772, at *3 (citing International Brotherhood of Electrical Workers v. Skaggs, 130 F.R.D. 526 (D.Del. 1990)). The defendant's conduct does not rise to the level of "culpable" here. Culpable conduct in the Third Circuit is dilatory behavior that is willful or in bad faith. See Gross v. Stero Component Sys., Inc., 700 F. 2d 120, 124 (3d Cir. 1983); Metlife Capital Credit Corp.,1992 WL 346772, at *2; Stevens, 1991 WL 270092. Such conduct is not inferred from the default itself but must appear independently on the record. Spurio v. Choice Sec. Sys., Inc., 880 F. Supp. 402, 405 (E.D. Pa. 1995).

The record before me discloses that PowerPainter's default was initially attributable to the separation of Sharleen and Dallas Beckstead. The individual responsible for PowerPainter, Dallas Beckstead, was not originally served by Maaco. Sharleen Beckstead was served as a member of

PowerPainter; however, owing to the Beckstead's separation, Sharleen Beckstead was no longer involved with PowerPainter. As a result, PowerPainter did not respond within the time required. The tardiness of PowerPainter's response was further exacerbated by defense counsel's mistaken belief that only an attorney admitted in this district could sign an acceptance of service. When Dallas Beckstead was unable to procure funds to pay this local counsel, PowerPainter's response was further delayed. PowerPainter alleges it [mistakenly] believed it was never officially served and no answer was required. While PowerPainter's tardiness reveals a regrettable lack of diligence on the part of defense counsel and is not to be condoned, PowerPainter's actions do not rise to the level of inexcusable conduct. Therefore, after considering the record, I find that PowerPainter's behavior resulting in default was not willful or in bad faith and cannot be characterized as "culpable."

III. Conclusion

In conclusion, it should be noted that "the Third Circuit does not favor defaults." Accuweather, 779 F. Supp. at 802. If there is any doubt as to whether the default should be set aside, the court should err on the side of setting aside the default and reaching the merits of the case. Id. at 802. The alleged diligence, albeit late, of PowerPainter's local counsel is sufficient to meet the liberal standard of Fed. R. Civ. P. 55(c) that allows a court to set aside a previously entered default. I therefore grant defendant's motion to set aside the previously entered default in this case.

AND NOW this _____ day of November 2002, it is **ORDERED** that

(1) Defendant's motion to set aside the entry of default (docket entry #13) is **GRANTED**;

(2) Plaintiff's motion for a hearing (docket entry #6) is **DENIED** as moot;

(3) Plaintiff's motion for entry of a default judgment (docket entry #6) is **DENIED** as moot.

_____
ANITA B. BRODY, J.

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